1992

Dave Honrud and Stephanie Honrud v. Dale Kersey and Barbara Kersey : Brief of Appellant

Utah Court of Appeals

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STATE OF UTAH
IN THE COURT OF APPEALS

DAVE HONRUD and STEPHANIE HONRUD,

Plaintiffs/Appellees

V

DALE KERSEY and BARBARA KERSEY,

Defendants/Appellants.

APPELLANTS' BRIEF

APPEAL #: 920851

District Crt # C 91-4831

DEFENDANTS/APPELLANTS' BRIEF

URAP 29(b) PRIORITY 15 UNCATEGORIZED APPEAL FROM THE THIRD DISTRICT COURT OF JUDGE ANNE STIRBA

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STATEMENT OF JURISDICTION

This is an appeal of right pursuant to Rules of the Utah Court of Appeals, Rule 3(a) & 4(a), from summary judgment granted by the district court and poured over from the Utah Supreme Court to the Court of Appeals.

STATEMENT OF ISSUES

I

Whether a jury trial may be denied by summary judgment granted upon pivotal findings of fact inferred from a hearsay included in a supporting affidavit contrary to URE 802, 803 (1), URCP 56 (e), 43 (a) & (b), and rebutted by pleadings, motions, affidavits and exhibits interpreted in a light most favorable to the non-moving party, Sellers.

II

Whether typed-in alterations or additional contradictions in a form contract supercede and vitiate pre-printed form language warranties contained in fine print on the back of the contract, rendering the printed terms ambiguous and suceptible to construction of the contractual terms against Buyers/drafters.

III

Whether the damages awarded for breach of warranty should be assessed in an amount to compensate for losses regarding the benefit of the bargain or should be assessed in the full amount of the price of a new device.

IV

Whether Sellers' Counsel may be punished as acting in bad faith for asserting Sellers' right to object to Buyers' attorney's fees as unreasonable for services that did not advance the progress of Buyers' case toward a remedy, or which were in excess of a reasonable amount of time necessary to provide services for the amount in dispute.

STATEMENT OF THE NATURE OF THE CASE

This is a case upon a form contract for the purchase of existing residential realty brought by Appellee alleging an express warranty and a breach.

About ten days after Appellants' answer to the complaint was filed, Appellees filed a motion for summary judgment before any formal discovery was completed. A hearing on the motion was held and the final orders/judgments in this case were entered on or about 21 September 1992 granting summary judgment, attorney fees, costs and sanctions.

The Notice of Appeal was filed and served on or about 16 October 1992.

CONCISE STATEMENT OF FACTS

Appellants sold existing residential real property to Appellees pursuant to a written form contract presented by Appellees. (Record - Agreement, pp 36-40).

Appellees had a professional inspect the property a short time before the closing and approved its condition. Appellees claim five days after the closing the heating system was defective. Appellees waited about thirty days and hired legal counsel who gave notice of the alleged defect and claimed a warranty existed. Appellees recovered the fee they paid their inspector and demanded a new furnace and attorney fees under the contract from Appellants. Appelles filed suit during negotiations. (R - Affidavit, p 64, para 9 & pp 63-85).

Appellants hired counsel and answered that written-in contract terms repudiated a warranty and the house was sold subject only to Appellees' approval. (R - Answer, pp 10-15). Appellants still offered to repair the furnace, replace it with a used furnace and offered to pay half the value of a new furnace less the fee recovered. Appellees refused, still demanding the price of an installed new furnace and attorney fees as damages. (R -pp 79,80 & 84, Sellers Affidavit, Ex B).

Ten days after Appellants answered the complaint Appellees filed a motion for summary judgment, costs, attorney fees and later moved for sanctions when Appellants objected to the Appellees statement of attorney fees as unreasonable. A hearing was held on the motion for summary judgment. (R -Answer, pp 10-15; Motion, pp 21-22).

A final order entered granting the relief Appellees sought in toto and this was noticed to Appellants' Counsel, initiating this appeal. (R -pp 140-142, Order & Certification).

STATEMENT OF FACTS

Appellants, "Sellers," sold a residential real property to Appellees, "Buyers", pursuant to a form contract, Sales Agreement, drafted by Appellees. (R - Agreement, pp 36-40).

Buyers hired a professional inspector to exercise their right under the Agreement to inspect the house, including the heating system. Buyers' inspector completed the inspection a short time before the 15 April 1991 closing and found no defects. (R - pp 11, Sellers' Answer, para 8-9 & pp 64 -Affidavit, Averment 9). Buyers approved of the condition of the property and closed. Shortly after closing, Buyers communicated a number of concerns to Sellers regarding the house. Sellers forthwith amicably resolved Buyers' inquiries. None of these inquiries concerned the heating system. (R -p 64, Affidavit, Averments 13-15 & pp 75-76, Ex A).

Buyers claimed a crack in the furnace existed five days after the closing, rendering it in unsatisfactory working condition. About thirty days after Buyers alleged they became aware of a problem with the furnace, they hired legal counsel, who notified Sellers. (R -p 77, Sellers' Affidavit, Ex A-10). Buyers asserted a warranty and then demanded installation of a new furnace and attorney fees under General Provisions C and N of the Agreement. Sellers attempted to gather information concerning the purported defect. (R -p 73, Sellers' Affidavit, Ex A-7). Sellers wrote to Buyers' attorney that Buyers' agent/inspector admitted he had found the furnace in average working condition before the closing. (R -p 70 & 66, Sellers' Affidavit, Ex A-1&5).Buyers did not respond, but filed suit in the district court for the value of a new furnace instead.(R -p3 Complaint, para 9 & 16).

Sellers retained legal counsel and answered that the furnace was in satisfactory working condition at the closing, that written terms of condition 1 (e) of the Earnest Money Sales Agreement and other clauses expressly repudiated warranties, and that Buyers accepted the house after the inspection. Trial by jury was demanded. (R -pp 10-13, Sellers' Answer).

Sellers offered to repair the purported defect as an Offer of Judgment. (R -p 16). This was refused. Sellers then offered to replace the furnace with a used furnace. (R -pp 18, 19, 79, 80 & 84, Sellers Affidavit, Ex B). This was refused, purportedly upon the hearsay opinion of un-named declarants whose affidavits were not proffered. (R -p 46, Buyers' Affidavit, Averment 18.) Sellers then made an offer of judgment for the estimated value of an operational used furnace, half the price of an installed new furnace less the fee Buyers recovered from the inspector who approved the furnace. (R -pp 79, 80 & 84, Sellers Affidavit, Ex B). Buyers still demanded the full price of a new installed furnace and attorney fees.

Buyers filed a motion for summary judgment before any discovery was completed. (R - p 21-22). Buyers' supporting affidavit swore that, five days after the closing, the affiant Buyer had heard another say that a crack in the furnace existed and other unsubstantiated statements. (R -p 43). Sellers filed a Response objecting to the inclusion of hearsay in the Buyer's affidavit. (R -p 60). Trans 3/2/92, p 10, ll 15-17. Sellers' counter-affidavit rebutted the hearsay about the furnace according to the URE 801(d)(2) admission of the Buyers' agent/inspector that the furnace was in satisfactory condition prior to the sale. Sellers' affidavit directly rebutted Buyers' complaint of breach of warranty and averred the

satisfactory working condition of the furnace on the day of the closing and the safe and uneventful operation of the furnace since 1983. (R - p 64, Sellers' Affidavit, Averments 10-12).

Sellers responded at the URCP 56 hearing that the Agreement was ambiguous and should be construed against the Buyers, drafters, to except a warranty especially upon the typed and written-in terms within four corners of the Agreement 1(e), 7 and the counter-offer. Trans, pp 13-15. Sellers asserted Buyers accepted the contractual condition of an inspection to assess the fitness of the house, excepting any warranty. Sellers argued below that should warranties be found, notwithstanding the written-in intention to except them, pursuant to General Provision C, the application of warranties is expressly limited to the time "at closing." Buyers countered that warranties were effective for an indefinite period beyond the closing pursuant to General Provision O, which abrogated the Agreement upon closing except for those extended by express warranty.

Sellers additionally asserted below that Buyers' affidavit was legally insufficient and summary judgment was inappropriate since Buyers' affidavit relied upon self-serving hearsay as to what a nameless declarant purportedly said concerning the heating system (Agreement, 9) five days after the Buyers took possession of the property . Trans pp 10, ll 11-25 - pp 12, ll 1-12. The hearsay was inadmissable regarding the pivotal fact of whether the furnace was in satsfactory working condition **at the closing.**

Buyers asserted the hearsay of the nameless declarant was excepted from the hearsay rule as a "present sense impression". Buyers' affidavit did not foundationally establish that the utterance was made spontaneously while the declarant was witnessing any purported

splitting in the furnace seam, or whether the condition was observed before the closing. (R - pp 44 & 45, Buyers' Affidavit, Averments 7 & 12 vis-a-vis Sellers' Affidavit, pp 73, 68, 66 & 71, para 2 "at closing.")

Buyers submitted a Statement of Fees (R -p 111) that showed the declarant from Mountain Fuel would provide no affidavit corroborating the hearsay proffered by Buyers as that of this un-named declarant. This hearsay was contradicted by admission of Buyers' agent/inspector. (R -p64, Averment 9 & p 66, Ex A-1). Sellers argued Buyers did not satisfy their burden to show by admissable evidence that the furnace was irreparable or whether a crack existed at closing to breach the alleged warranty. These genuine questions of fact to be decided by the jury, were found against Sellers upon motion for summary judgment.

Sellers averred Buyers bought an existing house and plead that awarding damages at the full amount of a new furnace was erroneous. (R -p 11, Answer, para 9). It was never averred by Buyers that the parties contemplated the bargain included a new furnace in the used house. Inference from the affidavits and pleadings drawn in favor of the Sellers, non-moving parties, was that Buyers knew, or should have known through their agent/inspector, before closing that the furnace was used. Buyers did not show damages with any degree of certainty as to the value of the benefit of the bargain lost, a satisfactory used furnace. Buyers failed or refused to proffer a paid receipt or cancelled check evidencing the amount paid for the new furnace. (Trans -p 30, ll 16-25 - p 31, ll 1-13).

After the dispositive motion was heard, finalization of the judgment was held under advisement pending the submission and review of an itemized statement of services and attorney fees.

The district court initially stated it was struck that the amount of attorney fees demanded was high given the amount in dispute and offered Sellers the opportunity to object upon receipt of the itemized Statement of the Fees. Trans 3/2/92 p 30, ll 1-9.

General Provision N provided a reasonable attorney's fee may be granted when arising or accruing from enforcement of the Agreement or pursuing any remedy. Sellers' Response to Motion for fees and Objection (5/8/92) objected to the unreasonability of Buyers' demand for fees, since Buyers reasonably could have contacted Sellers first rather than waiting thirty days, hiring an attorney, demanding a brand new furnace for which Buyers never bargained and filing suit while negotiations were ongoing. (R -p 119, 133 & 60). Sellers argued a remedy could have been obtained without such needless expense. (R -p 62, Sellers' Response, para 8; p 64, Sellers' Affidavit, Averments 13-22; p 120, Sellers' Objection (1/10/92), para 6).

Buyers acknowledged Sellers "have a right to review and question fees ..." (R- p 133, Reply to Sellers' Response to Sanctions). The Sellers' Response to Motion for fees and Objection questioned those fees and cited case law to support the objection since the issue of the reasonability of fees demanded is always relevant. (R -p 122-125).

Notwithstanding the district court's initial opinion about the demand for attorney fees being high and Buyers' concession that Sellers had the right to question the fees, the district court punished Sellers' Counsel pursuant to URCP 11 for objecting to the amount of attorney fees sought. Trans, p 30, ll 1-13. The final order entered as an integral condition to be incorporated into the summary judgment. Notice of entry was served on Appellants' Counsel and this appeal was filed.

SUMMARY OF ARGUMENT

I

A jury trial should not been denied by a summary judgment granted upon hearsay, included in a supporting affidavit contrary to URE 802, 803 (1), URCP 56 (e), 43 (a) & (b), that is rebutted by pleadings, motions, affidavits and exhibits interpreted in a light most favorable to the non-moving party, Sellers.

STANDARD OF REVIEW

When the lower court has granted a motion for summary judgment as to the claims of the moving party, the appellate court engages in de novo review, since the matter below is constrained to be determined solely as a matter of law. No deference is extended the lower court's legal conclusions upon review for correctness. **Blue Cross v State**, 779 P2d 634 (Ut 1989). De novo review subsumes the application of the same standard of review required initially in the lower court. **Durham v Margetts**, 571 P2d 1332 (Ut 1977). The facts presented and all inferences arising therefrom are to be re-apprised in the light most favorable to the non-moving party, Sellers, since the lower court must refrain from weighing disputed facts and any doubt concerning factual questions must be resolved in favor of the non-moving party. 1

DETAIL OF ARGUMENT
APPLICABLE LAW

URCP 43 (a) provides Sellers the right to demand a jury trial so admissable evidence may be considered, and factual inferences may be drawn, by jurors. This right subsumes cross-examination of witnesses against a party to test credibility and reliability according to rudimentary principles of due process. URE 806. Contrary to the general rule granting a trial, evidence on motions may be presented by affidavit if an exception exists in the URCP, URE, or statutes of the

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1. **Morris v Farnsforth Motel**, 123 Ut 289; 259 P2d 297 (Ut 1953), **Beehive Brick v Robinson Brick**, 780 P2d 827 (Ut App 1989), **Winegar v Froerer**, 813 P2d 104 (Ut 1991).

State and the terms of the exception are satisfied. URCP 43(a) & (b). Buyers filed a supporting affidavit with a motion for summary judgment pursuant to URCP 56. Sellers filed a rebutting affidavit.

URCP 56 (e) states the requirements for affidavits supporting motions for summary judgment that permit undisputed evidence to be received without a trial and mandates in pertinent part:

> (e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in the affidavit shall be attached thereto or served therewith ... (Emphasis Added.)

The Utah Supreme Court held affidavits relying upon hearsay are prohibited and insufficient to support summary judgment, since they are inherently lacking indicia of reliability and credibility. 2 Likewise affidavits lacking personal observation or independent knowledge, lacking a showing of competence of the affiant to testify as to the facts asserted, or made upon opinion and unsubstantiated belief are inadmissable, insufficient and precluded by law. 3

Buyers submitted inadmissable statements below by arguing that the unsworn, out-of-court statements of an un-named declarant who purportedly worked for Mountain Fuel Supply Company was a URE 803(1) "present sense impression" exception to URE 802. URE 802 prohibits hearsay as inadmissable to prove the truth of the matter asserted.

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2. URE 802, 803 (1), URCP 56 (g), Western States Thrift v Blomquist, 29 Ut2d 58, 504 P2d 1019 (Ut 1972), Preston v Lamb, 20 Ut2d 260; 436 P2d 1021 (Ut 1968).
3. Treloggan v Treloggan, 699 P2d 747 (Ut 1985), Strange v Ostlund, 594 P2d 877 (Ut 1979).

The URE 803(1) exception to the general rule, that hearsay is inadmissable, states in pertinent part:

> (1) Present sense impression. A statement describing or explaining the event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Emphasis Added.

The URE 803(1) exception to URE 802 inadmissability on which Buyers rely is derived from the former Rule of Evidence 63 (4)(a) "res geste exception." This rule permits admission of hearsay only if the statement was uttered spontaneously while the declarant was perceiving the occurence of the event or condition described or shortly thereafter to assure that the declarant was so a part of the experience as to assure reliability by negating that the statement resulted from fabrication, intervening actions, or reflection. 4

Buyers' reliance on URE 803(1) falls far short of the Beck test. Beck in pertinent part requires declarants statement (2) not be a mere narrative about a past completed affair, (3) not be a mere statement of opinion, (4) be a spontaneous utterance evoked by the occurence itself and not be a product of premeditation, reflection, or design, (5) while not being coincident or contemporaneous with the occurence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, (6) and must be made by one who witnessed the act.

The statement must be so directly impelled by the happening of the thing as to be reflexively part of the occurence described to assure spontaneity and obviate reflection. McCandless, supra, p 618.

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4. State v McMillan, 588 P2d 162 (Ut 1978) which cited with approval in its holding Johnston v Ohis, 76 Wash2d 398; 457 P2d 194, 199 (1969) which relied on Robbins v Green, 43 Wash2d 315; 261 P2d 83, 86 and McCandless v Inland Northwest Film Serv, 64 Wash2d 523; 392 P2d 613, 618-619 both of which relied of the six point test established in Beck v Dye, 200 Wash 1; 92 P2d 1113, 1117; 127 ALR 1022 (Wash 1939).

Since a motion for summary judgment may have the effect of depriving the non-moving party of a jury trial and cross-examination under oath of opposing witnesses, the facts presented in the affidavits, depositions, pleadings, admissions and the inferences that can be drawn therefrom must be considered in a light most favorable to the non-moving party, and the moving party must clearly establish that all reasonable possibility that the non-moving party could win at trial is precluded or it is admitted. 5 Hearsay is insufficient and disfavored.

Granting summary judgment is improper and should be denied when a dispute remains regarding a material fact even if only one sworn statement in a counter-affidavit or pleading presents a dispute, since an issue of fact is created that must be resolved at trial. 6

The general rule is that a motion for summary judgment should not be granted until discovery is complete. **Downtown Athletic Club v Horman, 740 P2d 275 (Ut App 1987), cert den 765 P2d 1277.**

DISCUSSION

An ultimate issue and pivotal factual question in this case turns on when, if at all, the purported parting or "cracking" of the furnace occurred. The unsworn, un-named Mountain Fuel employee, to which Buyers attribute outcome determinative hearsay, did not witness the act. Buyers' affidavit does not swear that the hearsay opined was evoked upon participating in, or witnessing, the alleged parting of

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5. URCP 56 (c), URE 806, **Beehive Brick v Robinson Brick**, 780 P2d 827 (Ut CA 1989), **Frederick May v Dunn**, 13 Ut2d 40; 368 P2d 266 (1962), **Sorenson v Beers**, 585 P2d 458 (Ut 1978), **Synder v Merkley**, 693 P2d 64 (Ut 1984), **Estate Landscape v Mtn States Tel**, 793 P2d 415 (Ut CA 1990), **SLC Corp v James Constr**, 761 P2d 42 (Ut CA 1988), **Morris v Farnsforth Motel**, 123 Ut 289, 259 P2d 297 (Ut 1953).
6. **Brown Realty v Abbott, 562 P2d 238 (Ut 1977), Young v Frelornia, 121 Ut 646; 244 P2d 682 (Ut 1952), cert den 344 US 886; 73 S Ct 186; 97 LEd 685, Holbrook Co v Adams, 542 P2d 191(Ut 1975)**

the seam contrary to Beck. Buyer/affiant swears only that he was a witness to declarant's opinion made merely upon a later observation of a purported result on or about 20 April 1991 regarding a past or completed event. (R -p 44, Buyers' Aff, Aver 7.) This hearsay plainly fails the Beck test and is inadmissable.

Simply, the URE 803(1) exception to inadmissability is not effective if the declarant is not a bystander who witnesses the occurence of the event that stimulates the declarant to reflexively make a spontaneous statement about the act observed. The hearsay of Buyers' declarants does not qualify because they made no spontaneous statement while observing the occurence of the split. Present sense impressions are a limited exception, not the rule.

Buyers' proffer of hearsay in their affidavit is equivalent to admitting into evidence statements of a person who happened by the scene of an auto accident an indeterminate period of time after the alleged event occurred and allowing that person's hearsay to establish how or at what time the accident occurred and who was at fault, all without any foundation to qualify the person as an expert.

Buyers offer the declarant as a psuedo expert, a Mountain Fuel employee, without any foundation concerning qualifications of the declarant to render opinion hearsay. This violates URE 702. The Affidavit of Buyers' attorney and Statement of Attorney Fees, 10/23/91, 10/24/91, 10/28/91, filed below show Mountain Fuel and its counsel were conferred with by Buyers' counsel but declarant's sworn affidavit was not forthcoming. This refusal provides an inference, reasonably drawn in favor of the non-moving parties, that declarant was unwilling to corroborate the hearsay Buyers' affidavit avers either because declarant did not say what Buyers aver or he recants

the hearsay. Discovery could clarify these facts, but none was completed before Buyers filed the URCP 56 motion and no cross-examination was had at trial to demonstrate to the court the infirmity of Buyers' case which is primarily dependent on hearsay.

Beck is also instructive that the courts are especially reluctant to refrain from applying the inadmissability requirement of Rule 802 to present sense impression hearsay when the declarant is unidentified. Not only is the declarant herein un-named, but the witness/affiant is not the declarant, the witness/affiant obviously has a major self-serving interest in evading the hearsay rule, and the neither the witness/affiant nor the declarant are subject to confrontation or cross-examination to test the reliability of the hearsay in Buyers' Affidavit. The declarant, who would not affix his or her signature on Exhibit B of Buyers' Affidavit was unsworn at the unspecified time and at the location where the hearsay was alleged to have been made. (R -p 54).

The witness/affiants, Buyers, were not examined as to the circumstances under which the declarants offered the hearsay, as an aid in evaluating the credibility of the statements which are unfairly prejudicial to the non-moving party. Since the hearsay is more prejudicial than probative regarding when the alleged crack occurred it is excluded by URE 403, especially where such statements lack the indicia of credibility and reliability required by URCP 56(e).

Likewise, Buyers' Exhibit B, unsworn and uncertified contrary to URCP 56(e), is inadmissable under URE 803(6). Exhibit B does not substantiate the hearsay of the declarant about a "large split" or "the release of toxic gas" that Buyers offered the lower court for obvious effect. Sellers affidavit squarely rebuts this inflammatory

hearsay as did Buyers' inspector's admissions. (R -p 64, Sellers Aff, Averments 9-12 vis-a-vis Buyers' Aff, Averment 12 and Trans p 2, ll 8.

The hearsay Notice, Buyers' Exhibit B, is inadmissable since it is unsworn by the declarant and uncertifed by a qualified record keeper contrary to URE 803(6) and URCP 56(e). It appears to contradict Buyers' assertion that the furnace was unconnected (R -p 44, Buyers' Aff, Averment 7) and the lower court's erroneous fact finding that the furnace needed to be hooked-up. Trans, p 29,11-12. Exhibit B comports with Agreement 1(c), indicating the gas was connnected, and states the furnace <u>was shut off on 20 April 1992</u> for a reparable or correctable flame disturbance. The fact finding and inferences drawn in favor of the moving party were contrary to law and Buyers' Exhibit B. Trans 3/2/92 - p 23-24. Why Buyers waited five days after the closing is unexplained, as is why Buyers waited thirty days to notice the purported defect through an attorney rather than directly calling upon Sellers to cure.

When the facts before the lower court are viewed in a light most favorable to Sellers, the Notice of the Mountain Fuel Supply Company, prohibited by URCP 56 (e) and unsigned by the declarant, is directly rebutted by Sellers' Affidavit, Averment 10. Seller swears the gas was turned-off on the day of closing, 15 April 1992, not disconnected, and the furnace was in satisfactory working condition. (R -p 64).

The inference to be drawn in favor of Sellers is that the defect, if any, occurred <u>after</u> the closing, or Buyers tampered with the furnace. There are genuine and critical issues of fact to be determined by the fact finder at trial.

Similarly Buyers' Counsel proffered to the lower court hearsay alleged to have been made about September 1991, five months after the

closing and after Buyers filed suit. Counsel stated to the Court this inadmissable hearsay about the furnace was "verified." Trans, p 3, ll 6-7. No affidavit from any of these declarants was submitted. The content of Buyers affidavit is devoid of a sworn statement that Buyers/affiants personally witnessed what they aver others observed. (R -p 46, Buyers Aff, Averments 16 -18).

The reliance of Buyers' affidavit on inadmissable hearsay to create prejudicial inferences in favor of the moving party as if they were proof contravenes the protections intended by URE 802 and URCP 56 (e). Buyers' affidavit is devoid of averments of personal observation or independent knowledge of any crack, its length or location, or of being possessed of any competence to establish a foundation for their expertise to render an opinion on the reparability of the furnace or toxic fumes. To the contrary the affidavit is a plethora of self-serving, unreliable and inadmissable hearsay - "he explained, he said, we were told, we informed, she communicated, what others witnessed, we spoke, he stated, he recommended, having been told, etc" - mostly ascribed to un-named declarants who were not subject to oath. (R -p 44, Buyers Aff, Averments 7, 8, 12, 18, 19, 22, 10, 11, 13, 14 and 24.

At the hearing below, the lower court expressed knowledge of the need for compliance with the Rules of Evidence regarding motions for summary judgment, but erroneously applied a relaxed hearsay standard that is contrary to uniform application of that general rule required by URCP 56 (e) and enforced by Utah appellate courts as taught in Western States Thrift, Preston, Treloggan, and Strange cited above.

When Sellers' Counsel attempted to clarify in the record for the lower court why each of the evidentiary infirmities in the affidavit were inadmissable, the court advised it had already ruled and declined to permit counsel to proceed to clarify Sellers' position on the evidentiary law for the court. Trans, p 11, ll 4-25.

CONCLUSION

Buyers' affidavit averred inadmissable hearsay of other declarants, absent affiants' personal observation and independant knowledge, contrary to URE 802, 801, URCP 56(e) and precedent. Buyers are not competent to testify as witnesses as to the truth of the seminal "facts" - whether the alleged crack preceded the closing.

The danger of unfair prejudice is greatly amplified in the instant case where the identity of declarants is unstated and the usual application of the URE 802 inadmissability standard should be enforced. Morgan, Basic Problems of Evidence, 340-341 (1962).
That the URE be strictly applied pursuant to URCP 56(e) on summary judgment is vital since the non-moving party is deprived of basic due process protections integral to a jury trial, like cross-examination, to reveal unreliability of out-of-court statements of self-interested Buyer/affiants who offer hearsay of other unsworn declarants.

No discovery was completed, hampering impeachment of declarants. This generally precludes summary judgment. Downtown Athletic Club v Horman, 740 P2d 275 (Ut App 1987), cert den 765 P2d 1277.

Genuine issues of material facts in Buyers's affidavit are inadmissable and are squarely disputed by Buyers' counter-affidavit precluding summary judgment. Pursuant to the applicable law cited above summary judment should be reversed.

SUMMARY OF ARGUMENT
II

Typed-in alterations and additional contradictions in Buyers' form contract supercede and vitiate pre-printed warranties contained in fine print on the back of the contract, rendering the printed terms ambiguous and suceptible to construction of the contract against Buyers/drafters.

THE STANDARD OF REVIEW

The standard of review is de novo as set forth in Section I.

DETAIL OF ARGUMENT
THE APPLICABLE LAW

Words inserted in a printed form contract are assumed to take precedence over the printed matter. **Holland v Brown**, 394 P2d 77, 78: 15 Ut2d 422; 10 ALR3d 449 (Ut 1964). Words written show the true intent of the parties where contradiction arises in a form contract and when inconsistency exists between two provisions, the more specific provision will qualify over the general provisions. 7

Ambiguity exists in a contract when the terms may be understood to reach two or more plausible meanings, since they are then insufficient to express the meanings and intentions of the parties. **C.J. Realty v Willey**, 728 P2d 923 (Ut App 1988). Extrinsic evidence is permissible where ambiguity is not reconciled by an objective and reasonable interpretation of the contract as a whole, since the court should strive to interpret the agreement to harmonize all the provisions. 8

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7. **Norman v Recreation Centers**, 752 P2d 514 (Ariz App 1988), **Standley v Standley**, 652 P2d 1284, rev den 761 P2d 531. It is well settled that a contract will be construed against its drafter. **Park Enterprises Inc. v New Century Realty**, 652 P2d 918, 920 (Ut 1982).
8. **Utah Valley Bank v Tanner**, 636 P2d 1060 (Ut 1981), **Jones v Hinkle**, 611 P2d 733 (Ut 1980).

Where terms of an agreement are ambiguous, in conflict, or unclear, the judge must refrain from interpreting them on a motion for summary judgment and the intent of the parties is a jury decision. **Colonial Leasing v Larsen Bros Constr**, 731 P2d 483 (Ut 1986).

DISCUSSION

The lower court had before it the Agreement to be construed. The alleged warranty in General Provision C, from which Buyers assert the furnace warranty arises, is expressly limited in duration to the closing. Buyers contend ambiguously that General Provision O extends warranties beyond the closing for an indeterminate time. Since General Provision O contradicts the limitation expressd in Provision C, it must be construed against Buyers/drafters especially when this extension is extrinsic to the contract terms. Trans p 4, ll 2-4.

Interpreting the limitation expressed in General Provision C against Buyers to limit warranties to the date of closing is most appropriate, especially since General Provision P only exposes Sellers to the risk of loss or damage to the property until closing, when the risk passes to Buyers.

The Buyers' construction of General Provision O contradicts the "at closing" limitation in General Provision C that must be interpreted to mean warranties are expressly limited to, and do not extend beyond, the closing unless a warranty in the contract expressly manifests the intention of the parties to extend a warranty beyond the closing. No condition in the contract expressly extends General Provision C waranties beyond the closing. Nor does ambiguous condition 6 contain an express extension. As held in **Colonial Leasing**, interpretation of the ambiguity in Buyers' Agreement urged on the court is a factual dispute reserved for the jury.

Sellers, furthermore, offered no warranty to Buyers and made no representations at all concerning the fitness of the premises. Seller's Affidavit, Averments 1-7. The Agreement 1(e) states:

> (e) **Buyer Inspection.** Buyer has made a visual inspection of the property and subject to Section 1(c) above and 6 below , accepts it in its present physical condition , except: as outlined in paragraph 7

Condition 1(e) by its terms does not fairly alert the reader of General Provision C which surreptitously negates the acceptance of the physical condition upon inspection limitation. Sellers relied on the exception, " ... except: as outlined in paragraph 7", as typed into condition 1 (e) to exclude the printed reference to condition 6, Seller Warranties, that incorporated the fine print of General Provision C, that contradicted the additional "as is" terms of General Provision B, which referred to warranties outlined in condition 6, in which no warranties were expressed and "None" was typed-in, but which circuitously referenced printed General Provision C. This contract is a quagmire for the layman.

Holland and **Norman** cited above hold <u>the specific typed in exception</u> is a more accurate manifestation of the intention of the parties than the "General Provision" fine print terms on the back. Typed in condition 7, <u>specifically typed</u> by reference in condition 1(e) as the exception to printed condition 6 warranties, "outlines" the limitation of Buyers to an inspection of the property to assure Buyers accepted its condition. In this way if some defect was found by the inspecting Buyers, that Sellers were unaware of while living in the house, the price could be negotiated at arms length prior to the closing. As written in the counter-offer, the sale price was reduced accordingly. (R -p 51 & 53, Agreement.)

Logically condition 7 would be redundant surplusage if that typed in portion of condition 1(e) did not have the excepting effect on warranties that Sellers averred. Without the typed in exception Buyers would have the same right referenced in the printed terms of condition 1(e) to disapprove of the property after the inspection and decline the purchase as the right typed in condition 7. Redundancy was not intended by the drafter or parties, therefore the exception in condition 1(e) is construed to have another meaning. On a motion for summary judgment the provision construed to favor the non-moving party, was not mere duplication, it was to maintain the risk with Buyer after inspection and acceptance and eliminate Sellers' exposure to lingering warranties.

The specific typed in exception prevails as the intent of the parties over General Provision C printed on the back, so warranties are excepted and Buyers should seek recourse from their inspector on whose assurance they relied. The inspector was not joined as a party.

The Agreement Buyers/drafters presented to Sellers is fraught with contradictory, circuitous language that should be construed against Buyers, otherwise a layman who wished to sell property solely upon the Buyers' acceptance of the fitness of the property would be defeated by the convolutions in the contract. Condition 1 (e) turns in on itself and is ambiguous, even absent the typed in exception that is effective in the instant case. Condition 1(e) states Buyer accepts the property in its present physical state upon inspection. Actually this is untrue and Buyer isn't accepting the property in its inspected condition. Hidden warranties adhere on the back.

Ambiguity exists within condition 1(e) itself that gores Seller on the horn of the reference to condition 6 in condition 1(e) which eviscerates "the acceptance in its present physical condition" terms through fine print General Provision C warranties neatly tucked away on the reverse side on the page on which condition 1 (e) appears. To have notice of General Provision C one must look from condition 1(e) to condition 6 which only references General Provision C. Buyer then could argue after a purported defect arises that the present physical condition was not accepted, although a seller is ambiguously lead to believe the "as is" effect of acceptance presented by condition 1 (e). A layman would conclude Buyer takes the property as it appears after inspection according to the maxim of "caveat emptor."

In the instant case, condition 1(e) provides that Buyer accepts the property in its present physical condition and the specific typed-in terms except from the printed terms of condition 1(e) subjecting Buyers' acceptance of the property to the warranties in condition 6, since the expressed typed-in exceptions "as outlined in paragraph 7" negate condition 6. No warranteed features are typed-in condition 6.

According to condition 11, the fine print General Provisions on the reverse side of the Agreement are not incorporated if indication is contained in the Agreement that such boilerplate is unacceptable. Thus the exception to condition 6 specifically and expressly typed in condition 1 (e), outlined in typed condition 7, and written in as a limitation in the Sellers' counter-offer on page three of the Agreement plausabily defeats the incorporation of General Provision C.

It is no wonder Buyers waited about thirty-five days after the closing to utilize an attorney to create a warranty from the ambiguous form contract Buyers presented, but which warranty was not in the contemplation of the parties. Seller's Affidavit, Averments 2-7.

C. J. Realty holds that the plausibilty of the diverse interpretations arising from the contradictory terms contained within the four corners of the Agreement are ambiguities and they must be interpreted against Buyers/drafters at trial. On summary judgment construing ambiguities is precluded according to Colonial Leasing.

CONCLUSION

Sellers having expressly excepted warranties from Buyers acceptance of the physical condition of the property after the condition 1(e) inspection and having specifically written a counter-offer on page three of the Agreement reiterating the limitation to acceptance upon the right to inspection that Buyers exercised through their inspector, Sellers are not subjected to condition 6 referencing General Provision C warranties that are negated according to condition 11.

Summary judgment predicated on a finding that a warranty existed and was effective beyond the closing should be reversed, and resolution of ambiguities left to the jury according to Colonial Leasing.

A warranty was erroneously imposed contrary to the written exception in condition 1(e). The alleged warranty was extended beyond the closing contrary to the express limitation in General Provision C that warranties ended "at closing." Buyers' assertion that General Provision O extends warranties beyond the closing, is contradictory and ambiguous and must be construed against Buyer.

The ambiguities within the four corners of Agreement should be resolved in favor of the non-moving party, Sellers, and should eventually be decided by a jury. Terms were not altered or added by Sellers argument below, Sellers merely offered a construction of terms existing in the Agreement that must be construed against Buyers/drafters and in favor Sellers on a URCP 56 motion.

Should warranties not be found excepted by condition 1 (e), ambiguity about the limitation of the warranties must be construed against Buyers/drafters and in the light most favorable to the non-moving Sellers as held in **Park Realty, C. J. Realty and Colonial Leasing** cited above. Buyers bear the burden of proving that the furnace cracked prior to the closing, and such evidence was non-existent as discussed in Section I even if a warranty is found.

Summary judgment should be reversed to permit the jury to decide the genuine issues of fact that are disputed and weigh the effect of absence of facts which Buyers have not proven by admissable evidence.

SUMMARY OF ARGUMENT

III

Damages awarded for breach of warranty should be assessed in an amount to compensate for losses regarding the benefit of the bargain and should not be assessed in the full amount of the price of new device.

THE STANDARD OF REVIEW

The standard of review is de novo as set forth in Section I.

DETAIL OF ARGUMENT

THE APPLICABLE LAW

If a warranty is found and is found to extend beyond the closing, contrary to General Provision C, Buyers are entitled only to be placed in as good a position as if the contract were performed, or in other words be awarded the benefit of the bargain lost consistent with the reasonable expectency interest or the bargain within the contemplation of the parties when the contract was entered. 9

Even when a motion for summary judgment is unopposed, the moving party still must satisfy the obligation of proving the amount of damages foreseeable to a reasonable person and with reasonable certainty. **Williams v Barber**, 765 P2d 887 (Ut 1988), Dobbs, **Remedies**, p 150. The fact-finder must not engage in speculation or guesswork, since damages must be a reasonable estimate based on relevant data. **Bigelow v RKO**, 327 US 251; 66 SCt 574; 90 LEd 652 (1946).

In determining the value of damages, the contracting party recovers the amount a willing buyer would pay, or a willing seller would accept for the thing before the loss, or more particularly regarding the "normal measure of damages" for breach of a warranty -

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9. D. Dobbs, **Remedies**, p 786 (1973); C. McCormick, **Handbook on Law of Damages**, p 561 (1935).

the value of the thing as warranteed less the value of the thing delivered. D. Dobbs, **Remedies**, p 144; C. McCormick, **Handbook on Law of Damages**, p 672. This is a factual question for the jury. It is inappropriate for the court to weigh evidence of damages since summary judgment is limited to legal determinations.

The contractual maxim that a plaintiff shall not profit more from a contractual breach than from its full performance is relevant since Buyers erroneously were awarded a new furnace. **Patent Scaffolding v William Simpson Constr**, 256 CalApp 506: 64 Cal Rptr 187,191 (1967).

Payment from a collateral source should be credited against the damages in this contract case, rather than permitting the breach to create a windfall. **10**

Damages awarded to the plaintiff must be reduced in a contract action when they are mitigated, or when a plaintiff fails to properly minimize damages, since plaintiff must avoid or minimize (mitigate) losses according to the doctrine of avoidable consequences. **John Call Engineering v Manti City**, 795 P2d 678, 680 (Ut 1990).

DISCUSSION

Buyers submitted no admissable or competent evidence below regarding the diminution of fair market value of the house measured as its price or value with a used furnace in satisfactory working condition less the value of the house with a used furnace that was purportedly defective. By law the Buyers were only entitled to the "normal measure of damages" for breach of a warranty - the value of the thing warranteed (a used furnace), less the value as delivered

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10. **Hurd v Nelson**, 714 P2d 676, 771 (Wy 1986), **Grover v Ratcliff**, 586 2d 213, 215 (Ariz App 1978).

(a used furnace with a purported defect), not the value of a new furnace. Trans p 30, ll 16-25 - p 31, ll 1-11. Assuming the purportedly defect furnace had no value as received, the value of the thing bargained for was an operational used furnace in a used house with no deduction for the existing furnace, however Buyers demanded and received a new installed furnace as replacement value.

Seller's Affidavit swore that he had lived in the house since 1983 and that it was approximately thirty-three years old. It was not in the contemplation of the Seller, nor could it have been the expectency interest of the Buyer, that the benefit of the bargain included a new furnace. The admission of the agent of the party/opponent, Buyers' inspector, about inspection of the used furnace is unrebutted. (R -p 64 & 46, Sellers' Aff, Averment 17 - Buyers' Aff, Averment 14.

The lower court engaged in prohibited fact finding in the absence of sufficient proof. Trans, p 30, ll 19-25 - p 31, ll 1-11. It reasonably should have been inferred that Buyers knew, or should have known, the furnace was used. Hence they had no contractual expectency interest to the value of a new furnace, but the court awarded Buyers the full value of an installed new furnace. Buyers were relieved of the obligation to prove not only what was in their contemplation with regard to the age of furnace, but also the value of an operational used furnace, to establish the "normal measure of damages" with reasonable certainty that could be subtracted from the alleged cost of a new furnace.

Buyers' Affidavit, Averment 22 is unlawfully absent a sworn or certified paid invoice or cancelled check regarding payment for installation of a new furnace. (R -p 47). The referenced bid is unsworn and uncertifed by a qualified business custodian and does not

meet URE 803(6) requirements necessary to except it as a business record from inadmissibility as URE 802 hearsay. (R -p 55). This deficiency or lack of foundation violates URCP 56(e) that expressly requires sworn or certified copies to assure authenticity, since the declarant was out-of-court and not under oath.

Admissable evidence as to the price of a used furnace compared to a new furnace is indispensable to a decision with reasonable certainty as to the "normal measure of damages" for breach of warranty - replacement value of the furnace with one in the condition contemplated by the parties at the time the contract was accepted. Subtracting from evidence of the price of a new furnace the value of an operational used furnace would establish what Buyers should contribute if they demand Sellers install a new furnace to satisfy Buyers' ulterior interest in additional dependability. (R -p 46, Buyers' Aff, Averment 18). Notwithstanding the lack of sufficient evidence on which to base a finding of the fair amount of damages with reasonable certainty, the lower court capriciously indulged in speculation that is strictly prohibited on summary judgment and awarded Buyers a windfall exceeding the value of the used furnace for which they bargained. Trans, p 31.

When the court <u>inferred facts from non-existent or hearsay documents in favor of the moving party as to Buyers' damages</u> without an admissable certified paid receipt or cancelled check, it erroneously reversed precedent held in **Beehive** and **Estate Landscape** that requires such inferences be decided in a light most favorable to the non-moving party who was deprived of a trial to dispute the amount of damages. Trans p 30, ll 16-25 - p 31, ll 1-7.

The lower court similarly misplaced its reliance on inadmissable hearsay contrary to URCP 56(e) to find as fact that the furnace was irreparable and gloss over the award of a new furnace without the evidentiary basis necessary to accurately substantiate the Buyers' damages with reasonable certainty beyond guesswork. Trans p 30, ll 23-25 - p 31, ll 1-11. The evidentiary requirements in URCP 56 and the URE are not discretionary, but must be applied to proof of damages as taught by **Williams** and **Bigelow**. Hearsay is URCP 56 inadmissable.

When plaintiffs fail to submit proofs necessary to accurately decide damages the lower court should not reinforce plaintiffs' failure by awarding plaintiffs the full value of a new item, since relenting to such deficiency is contrary to hornbook law and the principles held in **Bigelow, Patent Scaffolding and Williams**. The decision of the lower court is also contrary to URCP 56(e).

A simple example illustrates the fair determination of damages in this case. Buyer buys used skiis with used bindings represented as functional. Buyer pays a knowlegeable person to assess the skiis, who assures their serviceability. Buyer uses the skiis later and the bindings are defective. Buyer refuses Sellers' offer to repair and refuses to accept used bindings as a replacement, maintaining such remedies will be undependable. Buyer refuses half the price of new bindings installed still demanding new bindings. According to authority cited above, if Seller could not find used bindings to install or Buyer would not accept used bindings as a replacement, the Seller should be required to pay <u>the value of used bindings without defect as bargained for</u> toward the cost of installing new bindings. Seller is not responsible for the total price of new bindings - a windfall.

The lower court erroneously did not credit against the damages awarded the amount Buyers mitigated by recovering the fee from the inspector Buyers faulted for indicating the absence of the alleged defect in the furnace before the closing. Buyers did not join this inspector as a defendant. The windfall of a new furnace that exceeded a legitmate expectency of fair compensation was further increased by the recovery of the inspection fee. Buyers profited more from the breach than from full performance of the contract contrary to **Patent Scaffolding.** Buyers are required to credit the windfall, the amount mitigated, to Sellers. (R p- 64, Sellers' Aff, Averment 9.

Seller's Affidavit swore facts indicating Buyers unreasonably exacerbated their damages in violation of the doctrine of avoidable consequences held in **John Call Engineering.** Sellers demonstrated receptiveness to satisfaction of Buyers' concerns about other features of the house after the closing. (R -p 64, Sellers' Aff, Averments 13-15). Buyers, however, did not act reasonably to reduce or minimize damages. Seller swore Buyers failed to notify Sellers of the alleged problem with the furnace, unlike other concerns Buyers raised and had resolved, repudiated the opportunity to negotiate a cure and instead waited thirty days before communicating their demands through an attorney. This unnecessarily maximized expenditures for attorney fees, needlessly increasing the damages and immediately putting settlement out of reach since Buyers demanded these attorney fees.

Buyers unfair demand for a new furnace to replace a used one, unreasonably promoted the avoidable consequences of litigation.

Buyers refused the offer to repair and refused replacement with a used furnace allegedly based upon unsubstantiated and self-serving hearsay that Buyers ascribed to un-named declarants about these remedies being unpredictable. (R -p 46, Buyers' Aff, Averment 18).

This hearsay allegedly justified Buyers/affiants' intractable demand for a windfall - a new furnace. The lower court curtailed Sellers' attempt to show Buyers' refusal was unreasonable and increased the damages. Such contentiousness precluded Buyers' demand for attorney's fee. Trans, p 18, ll 15-25 - p 19, ll 1-19.

General Provision N permits a reasonable attorney's fee as damages to enforce the Agreement or pursue a remedy, not actual attorney's fees. Moreover, the doctrine of avoidable consequences and reasonability would require that a party, rather than paying for attorney fees to obtain the value of a new furnace contrary to the law of damages cited above, instead put Seller on notice of the defect and negotiate a cure. (R -p 77, Seller's Aff, Ex A-10.) Buyers filing suit during negotiations, merely because the Seller notified Buyers' attorney that Buyers' agent/inspector had found the furnace in proper working condition shortly before the closing, unreasonably increased the damages, attorney fees, and put an economical resolution further beyond of reach. Such needless haste and unnecessary expense violates the doctrine of avoidable consequences and should be discouraged. (R -p 66, Seller's Aff, Ex A-1.

It is Buyers' burden to establish that money for attorney fees was "reasonably" spent to procure a remedy that could not have been achieved in a more economical fashion and that they acted in a prudent fashion to mitigate, rather than exacerbate, the damages. Federal Courts, that interpret laws from which a substantial portion of the URCP and URE are derived, have extensively interpreted provisions that extend the opportunity to recover "reasonable attorney fees" under a variety of factual circumstances.

Johnson v Georgia Highway Express, 488 F2d 714 (CA5 1974) is the seminal holding often cited as establishing those factors to be considered in determining whether an attorney's fee is reasonable. The eighth factor in Johnson is most significant in this case - 8. the amount involved and the results obtained. The lower court alluded to this factor when initially noting it was struck that the amount of the fees Buyers demanded seemed high in relation to the recovery sought. Trans p 30, ll 1-7.

Buyers claimed erroneously that Sellers were in bad faith, since Sellers objected to a $4,000.00 fee in a case that allegedly involved only $1,100.00 for a new furnace. Such fees are unreasonable where attempting prudent negotiations could have provided a fair remedy more economically prior to increasing the damages by hiring an attorney and filing suit for a remedy in excess of what the law provides.

Other Johnson factors which demonstrate that Buyers' damages for attorney fees were unreasonable and avoidable consequences are:

1. time and labor required - Sellers Affidavit and Objection shows that services of Buyers' Counsel were unnecessary to obtain a fair remedy and also needlessly increased damages as twenty-nine and a half hours for a motion for summary judgment is high (R -pp 65 & 119);
2. the novelty and difficulty of the questions - Buyers admitted at the hearing that this was a simple case; Trans, p 1, ll 20-22.
3. the skill requisite to perform the legal services properly - Only average skills would be required in a case of this type;
4. preclusion of other employment - Counsel would be precluded from addressing other cases;
5. customary fee - Buyers' Counsel's 11 December 1991 affidavit was devoid as to her customary fee;
6. whether the fee is fixed or contingent - No indication of the terms of the contract with Buyers' Counsel was revealed;
7. time limitations - Time was not a factor enhancing the fee.
8. the amount involved and the results obtained - the amount recovered in the case was about 25% of the fee demanded;
9. the ability of the attorneys - average ability was required;
10. undesireability of the case - not applicable;
11. attorney/client relationship - not a factor;
12. awards in similar cases - unknown.

Johnson is especially relevant since Sellers offered half the price of a new furnace, less the inspection fee Buyers recovered, to replace the used furnace for which Plaintiffs bargained, and Plaintiffs' attorney fees were self-inflicted by their premature rush toward litigation prior to providing notice of the alleged defect or informally and economically negotiating a cure between the parties. A fairer result could have been achieved without the attorney fees.

Buyers' unprecedented demand for a new furnace through counsel, resort to the expense of an attorney before requesting a cure, and rush to the courthouse during negotiations evidence Buyers' unreasonable disregard for the doctrine of avoidable consequences and mitigation of damages. (R -pp 66-80, Sellers' Aff, Ex A & B).

Case law cited above precludes an award of a windfall like a new furnace that may last thirty years in a house that Buyers knew was an existing home with a used furnace, but Buyers unfairly would settle for nothing short of a new furnace, attorney fees and the additional recovery of the inspection fee, thus unreasonably increasing attorney fees, a consequence which could be avoided.

The Court may view as persuasive authority Federal cases refusing to award attorney fees pursuant to legal principles logically analogous to those bearing upon General Provision N in this case, that is the contractual doctrine of avoidable consequences. Where a litigant, like Buyer , refused to first test a potentially more economical and no less efficacious method of dispute resolution, like promptly communicating with the opposing party before incurring, and demanding, needless attorney fees, and instead exacerbate delay and increase the expense by litigating first, denial of fees is appropriate. Murty v OPM, 707 F2d 815, 816 (CA4 1983).

Likewise, when parties to a dispute are progressing toward a negotiated resolution although confronted with the prospect of exposure to attorney fees, Courts have refused to grant attorney fees to a party who refuses to direct a minimal response like a phone call to a defendant, to ascertain the accuracy of plaintiff's perception that defendant is no longer negotiating toward a resolution, before unreasonably filing suit due to a loss of patience. Vermont Low Income v Usery, 546 F2d 509, 513-514 (CA2 1976) states:

> But, as every lawyer should know, the fact that a party is legally entitled to invoke the aid of the courts does not demonstrate that a rush to the courthouse door is always reasonable.

This is exactly the tact Buyers took contrary to the doctrine of avoidable consequences. Buyers unreasonably increased their damages by expending attorney fees before giving notice of the purported defect and attempting to negotiate an amicable cure with Seller and then filed suit during negotiations without further contact when Seller informed Buyer that Buyers' inspector had found the furnace in average working condition before the closing.

CONCLUSION

The damages awarded by the lower court were not supported by admissable evidence. Affidavits that rely on hearsay are insufficient to grant damages on summary disposition according to URCP 56(e) and case law. Inferences from facts regarding damages should not have been drawn in a light most favorable to the moving party.

The award of the value of an installed new furnace exceeds the benefit of the bargain expected by the parties to the sale of a used house and is contrary to law. The doctrine of avoidable consequences and mitigation of damages requires Sellers be given credit in the

amount of the fee recovered from the inspector against the value of the damages. The doctrine of avoidable consequences and mitigation of damages requires no damages for attorney fees be awarded Buyers who unreasonably demanded the value of a new furnace, unreasonably increased damages for attorney fees before notifying Sellers of the purported problem and then demanded the recovery of those attorney fees, unreasonably filed suit during negotiations, and unreasonably refused the offers of reasonable remedies because Buyers had increased their damages for attorney fees and would settle for nothing less than a new furnace.

The lower court must refrain from deciding issues of fact on summary judgment and the jury should be allowed to determine the genuine issues of unproven and disputed facts regarding damages at trial. The judment below should be reversed.

SUMMARY OF ARGUMENT

IV

Sellers' Counsel should not punished or found in bad faith for asserting Sellers' right to object to Buyers' attorney's fees as unreasonable for services that did not advance the progress of Buyers' case toward a remedy, or which were in excess of a reasonable amount of time necessary to provide services for the amount in dispute.

STANDARD OF REVIEW

The punishment of an attorney by the lower court under URCP 11 is a question of law and the standard of review applied is de novo with no deference to the conclusions of the lower court. 11

DETAIL OF ARGUMENT

THE LAW

URCP 11 states in pertinent part:

> ...The signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well founded in fact and warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation ... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose on the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper including a reasonable attorney's fee. Emphasis Added.

URCP 11 virtually mirrors FRCP 11. **Clark v Booth**, 168 Ut Adv Rep 7, 9 (1991). Federal cases construing FRCP 11 are analogous to URCP 11 and are persuasive authority. **Gaiardo v Ethyl Corp.**, 835 F2d 479; 95 ALR Fed 93 (CA3) holds failure to prevail in the law suit does not trigger a sanction against an attorney under Rule 11 and advancing new or novel legal arguments is not punishable under Rule 11 after reasonable legal research and adequate factual investigation.

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11. **Taylor v Estate of Taylor**, 770 P2D 163 (Ut App 1989), **Smith v Smith**, 793 P2d 407, 409 (Ut App 1990).

The Gaiardo Court also held it would chill effective advocacy and run directly against the language and intent of Rule 11 to punish an attorney under circumstances where the legal principle advanced was not frivolous.

Rule 11 merely requires an attorney make a reasonable inquiry as to the facts and law before signing and filing a document and when the attorney believed the issue was well founded as the document was filed he or she should not be punished. Where an opposing party concedes that a document at the time of filing did not violate Rule 11, sanctions are improper. Jeschke v Willis 811 P2d 202 (Ut App 1991).

DISCUSSION

The holdings in Federal case law like Johnson set forth factors which demonstrate that Sellers' objections to Buyers' attorney fees for unreasonability are well grounded in the law, are maintained in good faith, and are not in any manner harassment, frivolous, or violative of Rule 11 or 78-27-56.

That Sellers' Objection to the unreasonability of the fees demanded by Buyers was brought in good faith is further strengthened, since even the district court in its initial opinion on the reasonability of Buyers' attorney fees stated it was "struck by the high amount given the amount that is in dispute." Trans p 30, ll 1-13. This is the eighth factor the Johnson court applied in determining the appropriateness of fees, as cited to the lower court by Sellers. The lower court also commented that Sellers could object to those high fees, however, when Sellers accepted the offer to object Counsel was punished. Clearly Counsel's objection to Buyers' unnecessary and "high" attorney fees is well grounded in the existing facts and legal principles, especially where Buyers demanded a remedy that was unfair and unsupported by the law of damages.

Nonetheless, Sellers' Counsel was punished by a Two Hundred ($200.00) Dollar sanction under URCP 11, generally for advocating a public policy argument based on the contractual doctrine of avoidable consequences and mitigation of damages as it applies to the over-crowding of the courts by contentious litigants, like Buyers, who unreasonably refuse to negotiate their demands with the opposite parties before hiring attorneys and "rushing to the courthouse" to file suit for a remedy in excess of what the law sets as fair.

Sellers were given no alternative but to resist Buyers' immediate demand for damages that were excessive according to the facts and law and to resist Buyers' demand for unreasonable attorney fees,or relent and be exploited. Counsel should not be punished for zealously defending his clients from the imposition of windfall damages that are contrary to well-settled hornbook law that precludes a remedy in excess of the benefit for which Buyers bargained.

Sellers argument for the extension of principles well grounded in existing law, the doctrine of avoidable consequenses, Johnson, and the intent of URCP 11, is relevant to the facts of this case and is not frivolous. Sellers' resistence to fees Buyers unreasonably promoted is a good faith legal argument for the advancement of public policy that is important to the jurisprudence of the State of Utah. It is not an ethereal aberration invented by Buyers' Counsel for an improper purpose or harassment but is a legitimate concern expressed in hornbook law and in cases like Murty and Vermont Low Income, as cited in the previous section, where reasonable courts have enforced a growing disenchantment with litigants who refuse to take the reasonable approach to informal alternative dispute resolution and instead prematurely clutter the court with litigation when

communication with the opposite party could have the potential of avoiding the intervention of the courts thereby promoting judicial economy and decreased expense.

Jeschke, cited above, holds that sanctions are improper where the opposing party admits the document itself was not in violation of URCP 11 when signed. Buyers' Reply to Sellers' Response to Sanctions concedes that Sellers have the right to submit documents to cause review of and to question the attorney fees claimed by Buyers. (R -p 133). However, Buyers assert their dissatisfaction with part of Sellers' Response erroneously claiming Sellers' argument that Buyers' attorney's fees are unreasonable is relitigation. Sellers state the matter could have been resolved more expeditiously and economically had Buyers' concern been noticed to the Sellers before exacerbating the damages by spending money for an attorney and demanding excessive damages contrary to law, a new furnace. (R -pp 79-80).

The issue of reasonability was relevant both during the hearing for the motion of summary judgment, or liability phase, and during opposition to the unreasonability of the attorney fees, or determination of damages phase, and is not punishable relitigation of the same issue. The alternative was endure Buyers running roughshod over Sellers' right to protest fees that even the lower court initially denominated as high and stand idly by without defending. That Buyers' Objection was grounded in fact and law and was not frivolous is especially true since the court declined to hear the reasonability issue during the URCP 56 motion. Trans p 19, ll 1-19.

There is a URCP 11 factual basis for Seller's claim that Buyers' contentiousness put settlement of this matter beyond resolution from the onset, increasing attorney fees contrary to the doctrine of

avoidable consequences, while Buyers sought to shift the results of their contentiousness and intractability to the Sellers.

Sellers objected to attorney fees demanded in the Affidavit of Buyers' attorney and Statement of Attorney Fees, for services on 10/23/91, 10/24/91, 10/28/91 to contact Mountain Fuel and its counsel for an affidavit that was not obtained. Sellers objected since the services produced nothing toward a positive result in the case. Sellers pointed out that the denial of the affidavit accounted for Buyers' attempt to introduce hearsay in their affidavit as an inadmissable alternative. (R -p 45, Buyers' Aff, Averment 12). This comment and objection was strictly relevant and in no way frivolous.

Johnson relevantly teaches that the failure to obtain an affidavit from Mt. Fuel should not be assessed against Defendants since such services added nothing to the progress of the case or result but expense. Defendants are in good faith when protesting non-productive fees pursuant to Johnson, especially since this objection is well grounded in facts below, that is in Buyers' Statement (R p- 111).

Johnson's factor eight substantiates Sellers' good faith, if not absolute, right to object to an excessive fee that produces a modest recovery. It is not bad faith or harassment under URCP 11 to object to that which the law deems improper or unjust, especially when established legal principles cited previously provide a logical and legal basis for such objections, if the lower court's own statement that it was struck that the fees seemed high is not enough to rely on in factually grounding Seller's opposition to such "high" fees.

Demanding fees for twenty-nine and one half hours to complete a motion for summary judgment in a "simple" case is excessive. Buyers' attorney fees should be denied to avoid reinforcing parties who

unreasonably rush to the courthouse to sue first, contentiously instigating and demanding attorney fees that put settlement out of reach, rather than economically communicating with the other party to negotiate a "reasonable" resolution before introducing attorneys and seeking the intervention of the courts to decide the situation. In this case Buyers' immediate introduction of an attorney into the problem and subsequent unfair demand for a new furnace exacerbated the damages for attorney fees contrary to the doctrine of avoidable consequences which requires reasonability.

CONCLUSION

The precedent the Buyers wish to set is that a party to the form contract, upon development of a purported defect after closing, can immediately hire an attorney, demand a remedy in excess of what the law of damages provides and thereby unreasonably increase the damages if the Seller does not immediately give-up and pay without protest. Should Sellers oppose this abuse and object to the fees instigated by Buyers' unreasonableness, Sellers' counsel is punished.

Punishing Sellers' Counsel for his reliance on well grounded principles of law like the doctrine of mitigation or avoidable consequences, Johnson, Vermont Low Income, Murty, etc. in opposing attorney fees that even the court initially stated seemed "strikingly high" is contrary to the terms of Rule 11 as held in Gaiardo.

The district court erroneously sanctioned Sellers' Counsel merely for exercising a right to object that the lower court itself recognized as legally available when it earlier stated the fees seemed strikingly "high." Later the court vacillated concluding erroneously that Sellers' objection to the unreasonability of the fees was in bad faith, was meritless, and was an attempt to relitigate.

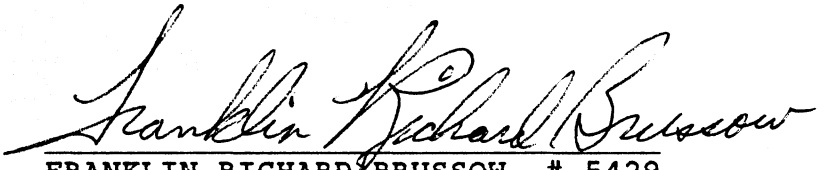
The argument Sellers sought to advance in good faith as public policy is that litigants who do not communicate with the opposite party before increasing damages should not be encouraged by an award of unreasonable attorney fees that would not have accrued but for Buyers taking a contentious, rather than a more reasonable and communicative approach. Trans p 19, ll 13-19. Sellers are not proscribed by URCP 11 from attempting to advance existing law that is important to the jurisprudence of Utah according to Gaiardo.

The punishment of Sellers' counsel should be reversed as contrary to the express terms of URCP 11 and cases construing that rule.

RELIEF SOUGHT

For the reasons contained in the Conclusions set forth above, Sellers seek an order reversing the grant of summary judgment, damages, attorneys fees and sanctions. Sellers seek remand, the grant of the right to discovery and the protections of a trial by jury.

12 January 1992



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